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IN THE

Supreme Court of the United States

No. 764 . October Term, 1944.

BUDD INTERNATIONAL CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY S. DRINKER,
FREDERICK E. S. MORRISON,
JOHN W. BODINE,
For Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Budd International Corporation, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the decision of the Tax Court sustaining respondent in denying to petitioner the right, in figuring Income and Undistributed Profits Tax for 1936 on the sale of a capital asset, to determine the cost of such asset by reference to its fair market value when acquired by petitioner and in not holding that petitioner was not subject to Undistributed Profits Tax in connection with the profit on such sale, despite the fact that petitioner had disbursed practically the entire profit from such transaction, together with all its other liquid funds, in expenses, dividends and the redemption of its preferred stock prior to the proposal of the Undistributed Profits Tax to Congress by the President.

OPINIONS BELOW.

The original opinion and judgment of the Circuit Court of Appeals and its opinion on rehearing are reported at 143 F. 2d 784 (R. 540, 554, 563). The opinion of the Tax Court (R. 495a-552a) is reported in 45 B. T. A. 737.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. Title 28, section 347) and Section 1141 (a) of the Internal Revenue Code, which authorizes this Court to grant the writ "either before or after a judgment or decree by such lower court."

The Judgment of the United States Circuit Court of Appeals to be reviewed was entered, after reargument, on July 17, 1944 (No. 8071, October Term, 1943). The period allowed for filing the present petition was, on October 11, 1944, extended by order signed by Mr. Justice Roberts to and including December 16, 1944 (R. 571).

QUESTIONS PRESENTED.

1. When a block of stock of a newly organized corporation is issued in exchange for several items of property, without any agreed apportionment of a specific number of shares to any of such items, and where there is no market in the stock and its fair market value cannot be thus measured, may the value of the shares issued in exchange for an item of such property subsequently sold at a profit be measured, in order to fix the basis of such property for the purpose of reckoning the taxable gain, by the fair market value, at the time of the exchange, of the property for which such shares were issued?

2. Where preferred stock of a corporation was issued prior to May 1, 1936, and the terms and conditions embodied in the stock certificate prohibited any dividends or

distributions to the common stock while dividends and sinking fund payments for the preferred stock are in arrears, did this certificate constitute a contract restricting the payment of dividends so as to give rise to a credit against the Undistributed Profits Tax under section 26 (c) of the Revenue Act of 1936?

3. Where a corporation redeems at $57 per share preferred stock which has dividends accrued and unpaid at the rate of $12.25 per share, the corporation at the time having an earned surplus in excess of the aggregate accrued dividends on all the stock so redeemed, was this equivalent, as to the $12.25 per share, to the payment of a taxable dividend, for the purpose of computing dividend paid credit against the Undistributed Profits Tax?

4. Under the facts as found by the Tax Court, was petitioner entitled to a credit against Undistributed Profits Tax on account of the sums paid in redemption of its preferred stock, by virtue of the Amendment by Section 501 of the Revenue Act of 1942 (Public Law 753, 77th Cong. 2nd Sess.) which added Section 26 (g) to the Revenue Act of 1936?

5. Would the subjection of a corporation to Undistributed Profits Tax on the gain from the sale of a capital asset prior to March 1, 1936, amount to a deprivation of the corporation's property without due process of law, where the entire amount of such gain, including all disbursable assets of the corporation, were distributed in redemption of the corporation's preferred stock with accrued dividends prior to March 3, 1936, the date when the President of the United States first recommended the enactment of the Undistributed Profits Tax to Congress?

STATUTES INVOLVED.

The pertinent provisions of the Internal Revenue Code and of the Revenue Acts of 1936 and 1942 are set forth in the Appendix.

STATEMENT.

In 1926 Edward G. Budd Manufacturing Company, a Pennsylvania corporation (hereafter called Manufacturing Company) organized Pressed Steel Company of Great Britain, and acquired 64% of the latter's common shares at a stipulated cost to it of $1,000,000, and also certain preference shares at a cost not here material. By 1930 the common shares had greatly increased in value.

In September, 1930, Manufacturing Company, together with Schroder & Company, London bankers, organized petitioner, Budd International Corporation, pursuant to an agreement between them made in April, 1930. The total stock issued by petitioner to them both was 76,572 shares of preferred stock and 436,572 shares of common stock. Schroder & Company contributed $3,000,025 and received 68,572 shares of preferred and 68,572 shares of common stock. Manufacturing Company, in addition to $344,458.01 of cash, contributed its Pressed Steel common and preferred shares, the majority of the stock of Ambi-Budd Presswerk, a German company, as well as certain license agreements, agreed to assign all future patents for use in Europe and to help train the working force of the new company, and further agreed to guarantee the dividends on petitioner's preferred stock (89% of which was issued to Schroder as above). For these stocks, contracts and cash, Manufacturing Company received 368,000 shares (84%) of petitioner's common stock and 8,000 shares (11%) of its preferred.

By 1936 the dividends on petitioner's preferred stock were more than three years in arrears, giving the preferred holders the right to voting control of petitioner.

In February, 1936, petitioner sold the Pressed Steel common shares to Schroder and British Pacific Trust, Ltd., for about $5,600,000. In the negotiations for this sale Schroder, as the holder of 89% of the preferred stock and hence in control of petitioner, "insisted" (as found by the Board) "on the retirement of its shares of petitioner's

preferred as a condition of any trade with it." Accordingly, on the completion of the deal the proceeds of the sale were first applied to retire Schroder's 68,572 shares of preferred stock with its accrued dividends, in a total of $57 per share, to the amount of $3,908,604. After deducting the amount to retire at $57 per share the 8,000 shares of preferred stock hold by Manufacturing Company, the expenses of the sale and a reserve for taxes (other than Undistributed Profits Tax, which at that time had not been enacted), petitioner had left $655,286.34, with which it paid a common dividend of $654,858, and had left on March 6, 1936, but $428.34, and had no other assets on which it could realize a substantial amount of cash.

After the entire transaction had been completed and the proceeds of sale distributed as above, Congress, on June 22, 1936, passed an amendment to the Revenue Act imposing an Undistributed Profits Tax on corporations failing to distribute their earnings in dividends.

The Board of Tax Appeals (now the Tax Court) held the petitioner liable to Income and Undistributed Profits Tax for 1936 to the amount of $582,202.42, with interest, in addition to the 1936 Income Tax already paid of $633,844.76. The Tax Court held that the petitioner's payment of $3,908,604 in redemption of its preferred stock plus accrued dividends did not reduce petitioner's earnings and profits, (which the Undistributed Profits Tax Act was aimed to penalize if not distributed to the holders of the common stock), despite the fact that when that Act was first proposed and passed petitioner had left no distributable funds to distribute.

The Tax Court held:

(1) That although the organization of petitioner in 1930 was probably not such a transaction as required petitioner under Section 112 (b) (5) of the Revenue Act to use its transferor's basis in reckoning the profit from the subsequent sale of the Pressed Steel stock, nevertheless peti-

tioner had not adequately proved the cost to it of such shares in 1930.

(2) That the provisions in petitioner's preferred stock certificates prohibiting dividends on its common shares while preferred dividends were in arrears did not constitute a written contract restricting dividends as to give rise to a credit under Section 26 of the Act of 1936, imposing the Undistributed Profits Tax.

(3) That the payment of that part of the amount paid in redemption of petitioner's preferred stock which represented the $12.25 per share of accumulated unpaid dividends thereon was not equivalent to the payment of a taxable dividend, giving rise to a dividend paid credit in reckoning Undistributed Profits Tax.

After the decision by the Tax Court (Nov. 19, 1941) and after the present petitioner had filed a petition for review to the Circuit Court of Appeals for the Third Circuit, Congress (after representations to the House and Senate Committees by this petitioner) passed the 1942 Amendment to section 26 of the Undistributed Profits Tax allowing retroactively an additional credit for that part of the gain from the sale of a capital asset prior to March 3, 1936, which, pursuant to a contract, was distributed to stockholders in redemption in whole or in part of preferred stock (for text see Appendix hereto p. 31).

The Circuit Court of Appeals originally refused respondent's motion to remand the case to the Tax Court for findings relative to the applicability of the amendment of 1942, but after argument and subsequently reargument on the case, held:—

(1) That on the organization of petitioner in 1930, Schroder and the Manufacturing Company did not receive stock in substantially the same proportions as they contributed property and therefore the basis of the petitioner in reckoning Income and Undistributed Profits Tax on the gain from the sale of the Pressed Steel stock was the cost

of such stock to petitioner in 1930 and not the cost of said stock to petitioner's transferor, the Manufacturing Company, in 1936.

(2) That petitioner had not adequately proved the cost to it of the Pressed Steel stock in 1930 (this holding is the primary basis of the present petition for certiorari).

(3) That although the provisions in petitioner's preferred stock certificate constituted a contract restricting the payment of dividends insofar as they required petitioner to set up a sinking fund for preferred stock, they did not constitute such a contract insofar as they prohibited dividends on common stock while preferred dividends were in arrears, so as to give rise to a credit under section 26 (c) of the Undistributed Profits Tax Act of 1936.

(4) The Circuit Court of Appeals did not pass on the question as to whether that part of the payment in redemption of preferred stock which represented accrued dividends was equivalent to the payment of a taxable dividend, giving rise to a dividend paid credit.

(5) The Circuit Court of Appeals remanded the case to the Tax Court for a finding as to whether the redemption of the preferred stock was "pursuant to a contract" within the meaning of the amendment of 1942.

Although the present petition is filed prior to a final disposition of the whole case by the Court below, that Court's decision of points (2) and (3) above against petitioner will, apparently, be final as to petitioner, provided the Tax Court makes a finding in petitioner's favor on the question for which the case is remanded. Accordingly, the petitioner's only opportunity to have the decision of the Circuit Court of Appeals reviewed on these points is by petition for certiorari filed at the present time.

The two questions of law decided against petitioner by the Circuit Court of Appeals as above, are:

(1) Whether the cost to petitioner of the Pressed Steel common shares in 1930 (which cost the Court below held was petitioner's basis for computing gain) may be approved as equal to the then fair market value ($3,000,000) of those shares, there being no market for, and, thus, no measure of the value of the new stock petitioner issued for those shares; or, whether the cost of the Pressed Steel shares to petitioner in 1930 must be taken to be equal to the cost thereof to Manufacturing Company in 1926 ($1,000,000).

(2) Whether, for the purpose of calculating Undistributed Profits Tax, petitioner was entitled to a credit for the amount paid (both principal and accrued dividends) to redeem its preferred stock, this latter question arising both under section 26 of the Revenue Act of 1936 allowing credits where the payment of dividends was precluded by a contract, and under the retroactive amendment to Section 26, contained in Section 501 (a) (3) of the new Act of 1942 providing, by adding paragraph (g) to Section 26, a credit for amounts paid to redeem stock prior to March 3, 1936, pursuant to a contract.

These two questions of law, although both of great importance in the administration of the Federal Income Tax Law, were neither of them questions within the peculiar knowledge and experience of the Tax Court.

On the first question, both Courts held that, although petitioner had proved *the fair market value of the Pressed Steel shares* at the time of their transfer to petitioner in 1930, this was no evidence of their cost to petitioner, which was the then *fair market value of the shares of petitioner's stock* issued in exchange for them.

On the second point, both Courts held that the provisions of petitioner's preferred stock certificate, prohibiting common dividends when preferred dividends were in arrears, were not such a written contract as to form the basis of a credit under section 26 of the Act of 1936.

The question as to the applicability of the Amendment of 1942 was not passed on by the Tax Court, since its decision in this case was rendered and appeal taken to the Circuit Court of Appeals prior to the passage of the 1942 Amendment. The latter Court held the Amendment applicable even though the contract to apply the 1936 profits to the redemption of the preferred stock was partly or wholly oral. The Circuit Court, however, remanded the case to the Tax Court for a specific finding as to the existence of a contract, despite the fact that the uncontradicted testimony showed that there was such a contract and of the further fact that the Amendment of 1942 was drafted and passed on the presentation to the Committees of the House and Senate of the opinion of the Tax Court in this very case. The Amendment was clearly designed by Congress to remedy the gross injustice which would result from subjecting this particular corporation to a penal tax for not distributing to its common stockholders dividends from profits which it had already completely disbursed to its preferred stockholders prior to the date when the President first proposed the Undistributed Profits Tax to Congress on March 3, 1936.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that proof of the 1930 fair value of the Pressed Steel shares was insufficient to show the then fair value of the shares of petitioner's stock then issued in exchange for them.

2. In holding that the terms and conditions embodied in the certificates of petitioner's preferred stock did not constitute a contract restricting the payment of dividends on the common stock while preferred dividends were in arrears, so as to give rise to a credit against Undistributed Profits Tax under Section 26 of the Revenue Act of 1936.

3. In failing to hold that the sum of $12.25 per share of the amount paid for the redemption of 68,572 shares of

petitioner's preferred stock was not equivalent to a taxable dividend and consequently did not give rise to a credit in reckoning Undistributed Profits Tax.

4. In failing to hold, under the facts as already found by the Tax Court, that petitioner was entitled, pursuant to the 1942 Amendment to Section 26 of the Revenue Act, to a credit for the amount paid its preferred stockholders in redemption of their stock.

5. In failing to hold as a matter of law that petitioner was not subject to undistributed profits tax for 1936.

REASONS FOR GRANTING THE WRIT.

I. This Case Raises an Important Question of Federal Tax Law, on Which the Decision of the Court Below Is in Direct Conflict With That of the 10th Circuit in Another Case, Which Question Has Not Been But Should Be Settled by This Court.

In *Commissioner v. McKinney*, 87 F. (2d) 811, the Circuit Court of Appeals for the 10th Circuit held, in an opinion by Judge Phillips,* that where a newly organized corporation had issued all its capital stock for nine oil leases plus $6,195.36 cash, with no segregation of the number of shares to each of the leases or to the cash, the value of so many of the shares as had been issued for one of the nine leases might be shown by proof of the value of such lease at the time of its acquisition by the company. In the case at bar the Tax Court and the Court below held that the value of so many of the shares of petitioner's stock as were issued for the stock of Pressed Steel Company could not be shown by proof of the then value of the Pressed Steel stock, because at the same time other shares

*This case, together with the prior decisions of the Board of Tax Appeals to the same effect, are fully analyzed in the Brief following, pages 15-30 hereof.

of petitioner's stock had been issued in exchange for other items of property, with no segregation of a given number of shares to the Pressed Steel stock and to the other items of property, factors which were also present in the *McKinney* case.

The Court below, as well as the Tax Court, agreed that where a newly organized corporation issues all its stock for a given piece of property, and there is no other feasible way of proving the value of the stock so issued and hence the tax basis for the property acquired, this may be shown by proof of the fair value of the property so acquired. They held, nevertheless, that this principle does not apply where several items of property were acquired by the issue of all such corporation's stock, with no proof of how many shares were issued for each item, despite numerous decisions by the Tax Court and the decision by the 10th Circuit above cited to the contrary, to none of which the Court below refers in its opinion, although they were cited to the Court in the briefs of counsel for the taxpayer.

In the organization of a business corporation, it is quite usual, particularly when such corporation takes over one or more going enterprises, for one or several blocks of its stock to be issued, in the aggregate, in exchange for several items of property. Where, as in the case at bar, the stock issued to the organizers is not substantially proportionate to the values of the property contributed,[1] the tax basis for determining profit on the subsequent sale by the new corporation of each item of property is the fair value of the shares issued by it in exchange for such property, and not the cost of such property to the transferor (Section 112 (b) (5) being inapplicable). Where, as is frequently the case, there are no contemporaneous sales of the new corporation's stock and no assets of the new cor-

[1] The Court below so held here. See R. 551-2, 143 F. (2d) at page 791.

poration giving its stock value, other than the assets in question newly contributed thereto, the method of determining the value of the new stock is by proof as to the value of the property for which the stock was issued. The authority for this method of determining the value of the stock is not only the very reasonable assumption that each of the parties to a business exchange "is getting his money's worth",[2] but also the impossibility of arriving at any other logical or equitable means of valuing such stock.

The decision of the Court below precludes the taxpayer, in cases of not infrequent occurrence, from the only available method of proof of an essential fact. There is, it is submitted, no basis in logic or in law for relegating such a taxpayer to the basis of its transferor, since Section 112 (b) (5) is inapplicable and therefore, under Section 112 (a), the transferor's basis may not lawfully be applied; nor would the Government permit its application if it happened to be higher than the later actual cost of the property to the transferee taxpayer.

II. This Case Raises a Second Important Question of Federal Law, on Which There Is a Conflict of Decisions Between the Court Below and That of the Fourth Circuit in Another Case.

In *Warren Tel. Co. v. Commissioner*, 128 F. (2d) 503 (cert. den. 317 U. S. 697), the Circuit Court of Appeals for the 4th Circuit held that the provisions of a preferred stock certificate prohibiting the payment of dividends on the common stock while cumulative preferred dividends were in arrears *did not* constitute a "written contract executed by a corporation . . . which . . . expressly deals with the payment of dividends," giving rise to a credit against undistributed profits tax under Section 26 (c) (1) and (2) of the Revenue Act of 1936. In *Lehigh Structural Steel Co.*

[2] See *Commissioner v. Mesta*, 123 F. (2d) 986, 988 (C. C. A. 3d).

v. Commissioner, 127 F. (2d) 67, the Circuit Court for the Third Circuit held that the provisions of a preferred stock certificate *did* constitute such a contract insofar as they required a sinking fund to retire preferred stock and also so held in the case at bar, but further held on reargument in the case at bar, that the provision in the same certificate prohibiting dividends on common stock while preferred dividends were in arrears *did not* constitute such a contract.

The important principle of Federal Tax Law which requires authoritative elucidation by this Court, is the distinction between an agreement made prior to May 1, 1936, by common stockholders with preferred stockholders (as an obvious inducement to the latter to contribute capital to the Company) precluding the payment of common dividends while preferred dividends are in arrears, and an agreement among the common stockholders not to pay dividends to themselves until a given sum is accumulated, the latter being precisely what the Undistributed Profits Tax was intended to discourage.

Although the decision of the Court below, here sought to be reviewed, is not a final disposition by that Court of the case, in that the Court remands the case to the Tax Court for a finding as to whether there was a contract, oral or written, sufficient to satisfy the Amendment of 1942 to Section 26 of the Revenue Act, nevertheless, the decision is final in the Court below as to the two points of law above discussed. Should your petitioner now go back to the Tax Court and that Court resolve the question submitted in petitioner's favor, petitioner would appear to be precluded from contesting by petition for certiorari the soundness of the decision by the Court below on at least these two points. Under the broad provisions of Section 240a of the Judicial Code, particularly as amended by the Act of February 13, 1925 (c. 229, sec. 1, 43 Stat. 938) by inserting the phrase "either before or after a judgment or

decree by such lower court," this Court may, in a proper case, review by certiorari cases which have not yet been finally disposed of below.

III. This Case Involves a Further Important Question of Federal Tax Law, on Which the Decisions of the Lower Courts Are Confused, and on Which There Is No Clear Pronouncement by This Court.

The Court below did not discuss in its opinion the question decided against your petitioner by the Tax Court, and discussed in the briefs for both sides in the Court below, as to whether the redemption by petitioner of its preferred stock amounted, as to the $12.25 per share accumulated dividends in arrears, to the payment of a taxable dividend. Petitioner contended that it did and that it was consequently entitled to a credit in reckoning undistributed profits tax, of $12.25 per share on the 68,572 shares redeemed from Schroder & Company, as well as on the 8,000 shares of the Manufacturing Company on which the dividend was paid as such immediately prior to their redemption.

BUDD INTERNATIONAL CORPORATION,

By EDWARD G. BUDD, *President,*
Petitioner.

HENRY S. DRINKER,
FREDERICK E. S. MORRISON,
JOHN W. BODINE,
1429 Walnut Street,
Philadelphia 2, Penna.,
For Petitioner.